

Message Text

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FM SECSTATE WASHDC

TO AMEMBASSY NEW DELHI

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E.O. 11652: N/A

TAGS: PFOR, IN, US

SUBJECT: JOINT COMMISSION: PL 92-463

REF: NEW DELHI 13304

1. INTERPRETATION AND APPLICATION OF FEDERAL ADVISORY COMMITTEE ACT (PL 92-463) HAS BEEN ONE OF MORE AGGRAVATING COMPLICATIONS ASSOCIATED WITH RECENT ESTABLISHMENT OF SEVERAL BILATERAL JOINT COMMISSIONS. THE ACT IS VERY BROADLY DRAFTED AND IS OF SUCH RECENT VINTAGE THAT THE COURTS HAVE NOT HAD MUCH OF AN OPPORTUNITY TO PROVIDE GUIDANCE AS TO ITS APPLICATION IN SPECIFIC CIRCUMSTANCES. MOREOVER, WHILE WE BELIEVE IT IS ARGUABLE THAT THE ACT SHOULD NOT BE INTERPRETED TO APPLY TO BINATIONAL COMMISSIONS OF THIS SORT, WE BELIEVE THE RISK OF LITIGATION AND OF UNFAVORABLE RULINGS IN THE COURTS IS SUFFICIENTLY GREAT THAT IT SHOULD NOT BE RUN UNLESS THERE ARE COMPELLING REASONS FOR DOING SO. AGAINST THIS GENERAL BACKGROUND, FOLLOWING ARE RESPONSES TO QUESTIONS SET FORTH REFTEL.

2. SECTION 3(2) OF THE ACT DEFINES AN "ADVISORY COMMITTEE"

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AS ANY GROUP "ESTABLISHED OR UTILIZED" BY THE PRESIDENT

OR ONE OR MORE AGENCIES "IN THE INTEREST OF OBTAINING
ADVICE OR RECOMMENDATIONS FOR THE PRESIDENT OR ONE OR MORE
AGENCIES OR OFFICERS OF THE FEDERAL GOVERNMENT."

COMMITTEES "COMPOSED WHOLLY OF FULL-TIME OFFICERS OR
EMPLOYEES OF THE FEDERAL GOVERNMENT" ARE EXCEPTED. UNDER
STRICT INTERPRETATION OF THIS LANGUAGE, A BILATERAL COMMIS-
SION COMPOSED ENTIRELY OF OFFICIALS OF TWO GOVERNMENTS
WOULD BE AN "ADVISORY COMMITTEE" WITHIN THE MEANING OF
THE ACT IF IT WERE ESTABLISHED OR UTILIZED BY THE USG
"IN THE INTEREST OF OBTAINING ADVICE OR RECOMMENDATIONS
FOR THE PRESIDENT OR ONE OR MORE AGENCIES OR OFFICERS"
OF THE USG. (THE FACT THAT A COMMISSION IS INTENDED PRI-
MARILY TO ADVISE THE OTHER GOVERNMENT DOES NOT NEGATE THE
PROPOSITION THAT THE USG AND ITS OFFICERS WILL ALMOST
CERTAINLY "UTILIZE IT" TO OBTAIN ADVICE IN RETURN WITH
RESPECT TO US POLICIES OF MUTUAL INTEREST TO THE TWO
GOVERNMENTS). WE HAVE, HOWEVER, TAKEN THE VIEW THAT SO
LONG AS THE COMMISSION IS COMPOSED ENTIRELY OF REPRESEN-
TATIVES OF TWO GOVERNMENTS, THE COMMISSION MECHANISM IS
A "DIPLOMATIC CHANNEL" WHICH DOES NOT LIE WITHIN INTENDED
COVERAGE OF ADVISORY COMMITTEE ACT.

3. THIS RATIONALE BECOMES SUBSTANTIALLY LESS CONVINCING
WHEN PRIVATE PARTICIPATION IS ADDED. SUCH PARTICIPATION
UNDERMINES THE "DIPLOMATIC CHANNEL" ARGUMENT UPON WHICH
NON-APPLICATION OF THE ACT TO JOINT COMMISSIONS IS PRE-
DICATED. MORE IMPORTANTLY, SINCE CONGRESS' PURPOSE IN
ENACTING THE LEGISLATION WAS TO DEAL WITH THE PERCEIVED
PROBLEM OF SPECIAL ACCESS TO GOVERNMENT POLICY PROCESSES
BY SELECTED PRIVATE INDIVIDUALS AND FIRMS, THE OPENING
UP OF OUR BILATERAL RELATIONS WITH FOREIGN GOVERNMENTS
TO DIRECT PARTICIPATION BY SELECTED PRIVATE INDIVIDUALS
CAN CREATE PROBLEMS CLOSELY RESEMBLING THOSE WITH WHICH
THE ACT WAS IN FACT INTENDED TO DEAL, SUBSTANTIALLY IN-
CREASING THE PROBABILITY THAT THE ACT MIGHT BE HELD TO
APPLY. WE HAVE THEREFORE CONSISTENTLY AVOIDED PRIVATE
PARTICIPATION ON COMMISSIONS THEMSELVES SO LONG AS WE
WERE NOT WILLING TO TREAT SUCH COMMISSIONS AS ADVISORY
COMMITTEES UNDER THE ACT.

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4. POINT OF PARAGRAPH 2 OF STATE 207588 WAS THAT WE COULD
AVOID LEGAL CHALLENGE UNDER THE ADVISORY COMMITTEE ACT
BY TREATING JOINT COMMISSIONS AS ADVISORY COMMITTEES AND
COMPLYING WITH THE REQUIREMENTS OF THE ACT, OPENING THE
MEETINGS UP TO PUBLIC PARTICIPATION. THIS WAS WHAT WAS
MEANT BY THE "OPEN-ENDED" APPROACH. WE WERE RULING OUT
THE "SELECT" APPROACH AS POSING UNACCEPTABLE LEGAL RISK

OF OUR BEING HELD IN VIOLATION OF THE ACT. INGERSOLL

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